No. 379.

Add'l Brf. of Stiles & Holladay for Petitioner.

IN THE

Supreme Court of the United States.

October Term, 1897.

Filed Oct. 16, 1897.

No. 379.

L. H. HYER, Petitioner,

v.

RICHMOND TRACTION COMPANY, et al.

On Certiorari to United States Circuit Court of Appeals for the Fourth Circuit.

CLOSING

Brief for Petitioner Hyer.

ROBERT STILES,
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INDEX.

TABLE OF CASES.

Amendment of Pleading—Discretion of Trial Court.

Cases cited under this head:

Allowance of Amendments—Practice as to.

Cases cited under this head:

LOBBYING.

List of Defendants' Authorities under this head, differentiated from the Case at Bar and disposed of.

Three of Defendants' Authorities most relied upon under this head—reviewed.

Relief Granted After Illegal Contract Executed. Authorities following Brooks v. Martin.

Cases cited under this head:

Jurisdiction in Equity—Specific Performance of Contracts Involving Stock.

Defendants' authorities reviewed:

Jurisdiction in Equity—Specific Performance—Degree of Certainty and Mutuality Required.

Defendants' authorities reviewed:

INDEX TO APPENDIX

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L. H. HYER, PETITIONER,

vs.

RICHMOND TRACTION COMPANY, ET AL.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Closing Brief for Petitioner Hyer.

In the short time left us, between the receipt of the defendants' brief and the day fixed for the hearing of the cause, it is impracticable to prepare and print a full and detailed reply. All that can be done is to again decline to be led off from what we still consider the real questions in the cause, and to expose what we deem to be the false basis and fallacious reasoning of our adversaries' note.

Defendants' Statement of the Case.

The first seventeen pages of their brief are taken up with what the learned counsel term "Statement of Case."

Near the top of page 3, it is declared, that "this is the more important, as the opening brief filed for the petitioner is very defective in its statement of material facts, and misleading in some of its parts. On behalf of those of the defendants represented by us, we therefore submit the following as an accurate statement of the facts disclosed by the record."

Without claiming that our spectacles are colorless, we willingly submit the two statements, side by side with each other and the record, leaving it to the court to decide between them,—premising, however, that the defendants' appears to us to be largely an argument in very thin disguise. Note, *e. g.*, how their entire "statement" is pointed and braced up by the free use of argumentative italics—see pages 4, 5, 6, 10, 11, 13, and 16; the interpolation, pages 3–4, as to the force and effect of the word "Conduit," supported by legal authority, and followed by deduction as to the withdrawal of competition contemplated in the contract of August 9, 1895; the discussion, on page 4, of the construction of the Act of March 20, 1860, and, on page 10, of the combined effect of said Act and the Traction ordinance; on page 12, the elaborate argumentative sentence, embracing three successive clauses under three successive "notwithstandings," and closing with a conclusion in rhetorical contrast with the premises.

We say we do not regard these and other like features as appropriate to the legal statement of a case. But, the great divergence between our statement and that of our adversaries, is not to be found in these, or in any other superficial, formal or unconscious differences. The fact is, the two sides are consciously and of purpose presenting different statements of the case to the court.

In the brief we had the honor to submit, the case is stated as it is set forth *in the last amended bill*, which was filed after the most formal possible notice—as to the particulars in which it would be asked the original bill should be amended; as to the

phraseology which it would be asked should be stricken out; as to the phraseology which it would be asked should be substituted and added: and as to the form which the bill would have if the leave to amend, as asked, should be granted. In short, before any demurrer had been argued, the plaintiff in the court below,—that is, in the Honorable Circuit Court—asked leave to amend the bill, both by striking out and by inserting certain specified phraseology, and so that the bill, as amended, would read '*as follows*':

Battle royal was had over this application, and leave to amend as asked was granted. Thereupon, the plaintiff filed a clean sheet of the bill as amended, and to this amended bill the defendants demurred. This is the demurrer which we argued in the court below, and which we are now arguing here.

Such being undeniably the state of the pleadings, the defendants, in their brief here, pages 19 and 20, make two points substantially as follows:

1. That the court below, *i. e.*, the Honorable Circuit Court for the Eastern District of Virginia, erred in granting the leave to amend.

2. That if such leave was properly granted, yet such is the legal force and effect of amendment—even an amendment of the character above set forth—that, in discussing the demurrer to the amended bill, the argument may properly be based on the bill as it stood prior to amendment.

In other words, the defendants' theory seems to be this:

Although an amended bill be valid and in no way obnoxious to legal objection, yet, if the original bill prior to amendment was open to objection and invalid, the demurrer to the amended bill, although based upon the very features of the original bill which have been stricken out by amendment, is well taken and should be sustained.

We find it difficult to *seriously* discuss this remarkable position. The entire brief of the defendants, certainly upon the great question of public policy, rests upon this astounding

basis and upon this basis alone. That brief is almost in terms, certainly in substance and effect, *a confession that the defendants have no case on the public policy defense upon the amended bill.* Their statement of the case, as bearing upon this point, is taken substantially, indeed almost exclusively, from the original bill, prior to amendment; while our statement, as above explained, is based exclusively upon the bill as last amended. This is the essential difference between the defendants' view and statement of the case and ours.

Their position strikes us as so extreme that we might be disposed to question whether we correctly apprehend the learned counsel, if they had not, upon page 18 of their brief, in the formal synopsis of their argument, laid down, as the introductory and fundamental proposition:

"The right to use the statements of the original bill omitted in the last amended bill," notwithstanding the fact above recited that the complainant's bill was amended, by leave of court granted after notice to defendants, after arguments *pro* and *con*, and prior to a hearing upon any demurrer filed by the defendants; and notwithstanding the fact that the cause was heard by the Circuit Court "upon the defendants' demurrer to the complainant's second amended and supplemental bill (that is to say, the amended and supplemental bill as amended by the decree herein of April 6, 1896, and in the form filed on the 18th day of April, 1896)"—see pages 119, 120, printed record—from which last mentioned bill the "omitted" statements had been stricken out by leave of the Circuit Court.

We respectfully submit that this contention is wholly without merit. Not only is it not sustained by the authorities cited in support of it, as we understand those authorities, but it is, upon several grounds, contrary to the entire theory and practice of "Amendment" in the courts of the United States, indeed in any courts, as numberless authorities show.

In *Chapman* v. *Barney*, 129 U. S., 681, this court said that "Amendments are discretionary with the court below, and not reviewable by this court." An order allowing the amend-

ments made by the complainant might have been entered by the Circuit Court without notice to the defendants, as provided by Equity Rule 29; but the Circuit Court exercised its discretion in this matter cautiously after notice to the defendants, and after considering the petition setting out the proposed amendments and the reasons why they should be allowed in the light of full argument upon formal printed briefs for and against the proposed amendments. The discretion vested in the Circuit Court was not only cautiously but rightly exercised. The amendments were in all respects proper in the light of surrounding circumstances, of which the Appellate Court cannot become as fully possessed as the trial court.

The rules and principles applicable in such cases have been stated by this court in numerous cases.

5 Cranch, 15.

Subject: Amendment of Pleading—Discretion of Trial Court.

In *Mandeville* v. *Wilson*, 5 Cranch, 15, "Marshall, Chief Justice, observed that the permitting amendments is a matter of discretion. He did not mean to say that a court may in all cases permit or refuse amendments without control. A case may occur where it would be error in a court, after having allowed one party to amend, to refuse to suffer the other party to amend also before trial. But that is not this case. After the parties have gone to trial upon a set of pleadings, and the judgment has been pronounced, it may be doubted whether the court can permit the demurrer to be withdrawn. It would not be right in all cases, after the party had taken issue upon the law and it has been decided against him, to suffer him also to take issue upon the fact. If it be permitted, it is a matter of great indulgence."

6 Cranch, 206.

Subject: Amendment of Pleading—Discretion of Trial Court.

In *Marine Insurance Co.* v. *Hodgson*, 6 Cranch, 214, the trial court having sustained demurrers to five pleas tendered by the

defendants and refused to allow the demurrer to the sixth plea, the cause was taken by writ of error to this court, where the demurrer to the sixth plea was sustained, and the cause remanded to the Circuit Court for further proceedings, 5 Cranch, 100. When the cause came to a second trial the defendants moved the lower court for leave to file two additional pleas, which motion was denied, and this action of the Circuit Court was one of the errors assigned on the second appeal.

Mr. Justice Livingston, speaking for the unanimous court, said:

"This court does not think that the refusal of an inferior court to receive an additional plea or to amend one already filed, can ever be assigned as error. This depends so much on the discretion of the court below, which must be regulated more by the particular circumstances of every case than by any precise and known rule of law, and of which the superior court can never become fully possessed, that there would be more danger of injury in revising matters of this kind, than what might result now and then from an arbitrary or improper exercise of this discretion. It may be very hard not to grant a new trial, or not to continue a cause, but in neither case can a party be relieved by a writ of error: nor is the court apprised, that a refusal to amend or to add a plea was ever made the subject of complaint in this way. The court, therefore, does not feel itself obliged to give any opinion on the conduct of the inferior court, in refusing to receive these pleas. At the same time, it has no difficulty in saying that, even in that shape of the proceedings, the Circuit Court might, if it had thought proper, have received these additional pleas, or admitted of any amendment in those already filed."

6 Cranch, 253.

Subject: Amendment of Pleading—Discretion of Trial Court.

In *Sheehy* v. *Mandeville*, 6 Cranch, 253, the following appears at the foot of the opinion:

"After the opinion was given, C. Lee moved for a direction to the court below to allow a plea of *non assumpsit*. The court said they had never given directions respecting amendments, but had left that question to the court below. This court cannot now undertake to say whether the court below would be justified in granting leave to amend."

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9 Wheat., 576.

Subject: Amendment of Pleading—Discretion of Trial Court.

In *Walden* v. *Craig*, 9 Wheat., 576, Chief Justice Marshall said:

* * * * "The cases cited by the plaintiff's counsel in argument are, we think, full authority for the amendment which was asked in the Circuit Court, and we think the motion ought to have prevailed. But the course of this court has not been in favor of the idea that a writ of error will lie to the opinion of a Circuit Court granting or refusing a motion like this. No judgment in the cause is brought up by the writ, but merely a decision on a collateral motion, which may be renewed. For this reason, the writ of error must be dismissed."

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1 Peters, 165.

Subject: Amendment of Pleading—Discretion of Trial Court.

In *Wright* v. *Hollingsworth*, 1 Peters, 165, the court, at page 168, said:

"They allege the judgment is erroneous and should be reversed.

"1st. Because the count on which judgment was rendered against them does not show that Missouri is one of the United States.

"2d. Because the court permitted the declaration to be amended by adding a new count on the demise of Benjamin Spencer; and especially as the amendment was permitted with payment of costs.

"3d. Because no plea was filed to the new count, nor any issue made up thereon.

* * * * "In support of the second objection, it is urged that the admission of the new count, on the demise of a new lessor, made a material alteration in the suit; that the suit having been originally commenced under the State practice, by writ of *capias ad respondendum*, to which the former lessors only were parties, the amendment was, in substance and effect, the institution of a new suit, or at least grafting a new one upon the old; and produced an incongruity upon the record; the first and second counts, and the proceedings on them, being proceedings under the statute, and the third, or new count, a proceeding at common law; and that, according to established principles of practice, it should have been allowed, if at all, only on payment of costs.

"This argument would be entitled to great, and perhaps decisive influence, if addressed to a court, having any discretion or power over the subject of amendments.

"But the allowance and refusal of amendments in the pleadings, the granting or refusing new trials; and, indeed, most other incidental orders made in the progress of a cause, before trial, are matters so peculiarly addressed to the sound discretion of the courts of original jurisdiction, as to be fit for their decision only, under their own rules and modes of practice. This, it is true, may, occasionally, lead to particular hardships; but, on the other hand, the general inconvenience of this court attempting to revise and correct all the intermediate proceedings in suits, between their commencement and final judgment, would be intolerable. This court has always declined interfering in such cases; accordingly it was held by the court in *Wood* v. *Young* (4 Cranch, 237), that the refusal of the court below to continue a cause, after it is at issue, is not a matter upon which error can be assigned. That the refusal of the court below to grant a new trial, is not matter for which a writ of error lies (5 Cranch, 11, 187, and 4 Wheat, 220); and that the refusal of the court below to allow a plea to be

amended, or a new plea filed, or to grant a new trial, or to continue a cause, cannot be assigned as a cause of reversal or a writ of error. We can perceive no distinction in principle between these cases and the one before the court. We must take the declaration, including the amendment, as we find it on the record. Nor can we interfere, because the court below did not, as it ought, require the costs formerly accrued to be paid as a condition of the amendment."

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3 Peters, 12.

Subject: Amendment of Pleading—Discretion of Trial Court.

In *United States* v. *Buford*, 3 Peters, 12, the Court at page 32, said:

"The court, it is contended, in refusing leave to amend, decided the effect of this covenant, and that they erred in their construction of it.

"This court has repeatedly decided that the exercise of the discretion of the court below, in refusing or granting amendments of pleadings or motions for new trials, affords no ground for a writ of error. In overruling the motion for leave to withdraw the replication, and file a new one, the court exercised its discretion, and the reason assigned as influencing that discretion, cannot affect the decision."

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2 Howard, 263.

Subject: Amendment of Pleading—Discretion of Trial Court.

In *Matheson* v. *Grant*, 2 How., 263, Mr. Justice Story, at page 284, said: "There is yet another view of this matter. The question of the amendment was a question of discretion in the court below, upon its own review of the facts in evidence: and we know of no right or authority in this court upon a writ of error to examine such a question, or the conclusion to which the court below arrived upon a survey of the facts, which seem to us to have belonged appropriately and exclusively to that court."

7 Peters, 634.

Subject: Amendment of Pleading—Discretion of Trial Court.

In *Ex-parte Bradstreet*, 7 Peters, 634, 647, Chief Justice Marshall said: "After hearing counsel and considering the cause shown by the honorable the judge for the court of the United States for the Northern District of New York, this court is of opinion that it ought not to exercise any control over the proceedings of the District Court in allowing or refusing to allow amendments in the pleadings: * * * "

2 Mason, 342.

Subject: Amendment of Pleading—Discretion of Trial Court.

In the case of *Hunt* v. *Rousmaniere*, 2 Mason, 342, 365, a well considered opinion was delivered by Story, J., after elaborate argument by Hunter and Randolph on one side, and Searle and Hazard on the other, in which that eminent jurist said: "This cause has been again argued upon the amended bill, and now stands for judgment. Some doubt has been thrown out in argument, as to the authority of the court to allow an amendment of the bill, after the cause had been decided in favor of the demurrer. I should be sorry, that any doubt of the propriety of such a practice should prevail in any case, where the court should be of opinion that it was called for by the real merits and justice of the case. If there were a stubborn rule of practice against it, it might induce one to pause. But I know of no such rule; and as far as cases go, they only show, that the court will exercise its discretion cautiously on applications of this nature. The authority of the court upon general principles seems unquestionable; and if it needed support, it falls within the express language of the judicial act of 1789, ch. 20, §32, which declares, that the courts of the *United States* 'may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the courts respectively shall in their discretion and by their rules prescribe.'"

129 U. S., 681.

Subject: Amendment of Pleading—Discretion of Trial Court.

And in the recent case of *Chapman* v. *Barney*, 129 U. S., 677, 681, decided March 5, 1889, it was again declared in plain and emphatic language that amendments are discretionary with the trial courts, and are not reviewable by this honorable court. In this case Mr. Justice Lamar, in delivering the unanimous opinion of the court, page 681, said:

"We do not think the first assignment of error well taken. Amendments are discretionary with the court below, and not reviewable by this court. *Mandeville* v. *Wilson*, 5 Cranch, 15; *Shelby* v. *Mandeville*, 6 Cranch, 253; *Walden* v. *Craig*, 9 Wheat, 576; *Chirac* v. *Reinicker*, 11 Wheat, 280; *Wright* v. *Hollingsworth*, 1 Pet., 165; *United States* v. *Buford*, 3 Pet., 12; *Matheson* v. *Grant*, 2 How., 263; *Ex-Parte Bradstreet*, 7 Pet., 634."

The complainants' petition asking leave to amend may be found on pages 66 to 79 of the printed record, and the decrees allowing amendment at pages 66, 118–119.

The discretion of the Circuit Court in allowing the plaintiff to amend his bill was exercised after giving due weight to the ingenious argument of defendants' counsel resisting the application, and its action is fully sustained by the rules of equity practice and the principles declared by this court in many cases.

These rules and principles were discussed in the printed argument filed by us, as counsel for the complainant, before the Circuit Court upon the application to amend, and the following are extracts from that brief, the italics employed being our own:

QUOTATION.

In the case of *The Tremolo Patent*, 23 Wall., the Court, at page 527, said:

"We think that the order of the Court directing that the

record be amended by inserting in the bill an averment of the second re-issue was properly made, under the circumstances of the case, though made after the final decree. For practically the rights of the complainants under the second re-issue, and the defendants' infringement thereof were in issue under the answer and the replication. The amendments deprived the defendants of no rights which they had not enjoyed during all the progress of the trial. It may well be denominated only an amendment of form, because it introduced no other cause of action than that which had been tried. It is true that an amendment which changes the character of the bill ought not generally to be allowed *after* a case has been *set for hearing*, and still less *after it has been heard. The reason is that the answer may become inapplicable if such an amendment be permitted.* But in this case the defendants were not prejudiced. They had every advantage they could have had, if the bill had originally averred the second re-issue. The case is undoubtedly anomalous, but we think justice would not be subserved by denying to the Circuit Court the power to order such an amendment as was made, after the cause was tried precisely as it must have been tried if the bill had originally contained the averment inserted by the amendment."

In *Richmond* v. *Irons*, 121 U. S., 27, the Court at page 46, said:

"The action of the Circuit Court in permitting these amendments we think is justified by the rules on that subject as stated by this Court in the case of *Neale* v. *Neales*, 9 Wall., 1: in *Tremolo Patent*, 23 Wall., 518: and *Hardin* v. *Boyd*, 113 U. S., 756, 761. In the last mentioned case it was said (p. 761): 'In reference to amendments of equity pleadings the courts have found it impracticable to lay down a rule that would govern all cases. Their allowance must, at every stage of the cause, rest in the discretion of the Court: and that discretion must depend largely on the special circumstances of each case. *It may be said*, generally, that, *in passing upon application to amend, the ends of justice should never be sacrificed to mere form*, or by too

rigid *an adherence to technical rules of practice.* Undoubtedly great caution should be exercised when the application comes after the litigation has continued for some time, or when the granting of it would cause serious inconvenience or expense to the opposite side. And an amendment should rarely, if ever, be permitted where it would materially change the very substance of the case made by the bill, *and to which the parties have directed their proofs.*' "

In *Jones* v. *Van Doran*, 130 U. S., 684, Mr. Justice Gray, speaking for the Court, at page 690, said:

"The only difference between the original and amended bills is that the first alleges that the defendant Jones took the conveyance of the plaintiff's right of dower upon an express trust for her, whereas the second alleges that he procured the conveyance from her by fraudulent misrepresentations as to the nature of the instrument, creating a trust by operation of law in her favor. The other facts alleged in the two bills are substantially identical. Each bill proceeds upon the ground that the defendant Jones was a trustee for the plaintiff, and that the defendant Van Doran, taking the land from him with notice of all the facts, was affected by the trust; *and the object of both bills is the same, to obtain the right of dower of which the plaintiff has been deprived by the acts of the defendants*, and to which she was entitled under laws of Minnesota in force at the time of her husband's death."

Pub. Stat., 1849–1858, c. 36 S., 1.

"The amendment was therefore one which the Court in the exercise of its discretion might properly allow, and the motion to strike the amended bill from the files was rightly denied."

Hardin v. *Boyd*, 113 U. S., 756.

In the case of *Bolton* v. *Apperson*, 26 Gratt., p. 207, Judge Staples, in delivering the opinion of the Court, on page 215, said:

* * * "The rule in equity in regard to amendments is, that

they may be made when the bill is defective in its prayer for relief, or in the omission or mistake of some circumstance connected with the substance of the case, but not forming the substance itself. The plaintiff will not be permitted to abandon the entire case made by his bill, and make a new and different case by way of amendment. *Shields* v. *Barrow*, 17 How., U. S. R., 130, 144."

"According to the English practice, where a party has mistaken his case, and brings the cause to a hearing under such mistake, the rule is, to dismiss the bill without prejudice to a new bill. But even there the rule is in many cases disregarded. Thus in *Major* v. *Dry*, 2 Sim. & Stu. R., 113, the complainant by his bill, sought to set aside a deed upon the ground of fraud. The defendant answered insisting upon the deed: the complainant being satisfied the deed could not be successfully impeached, was permitted to file an amended bill relying upon it."

"In *Smith* v. *Smith*, Cooper's Ch. Cas., 141, a bill for an account against the defendant as bailiff was allowed to be changed into a bill for the foreclosure of a mortgage. See the cases cited in 1 Daniel's Ch. Prac., page 408. It is said by the author just mentioned, that great latitude is allowed to the plaintiff in making amendments, and the court has gone to the extent of permitting a bill to be converted into an information. It has been held where a plaintiff filed a bill stating an agreement, and the defendant by his answer, admitted there was an agreement, but different from that stated by the plaintiff, that the plaintiff might amend his bill abandoning his first agreement and praying for a decree according to that admitted by the defendant.

"In the different States it is well known, that the practice of courts of equity in allowing amendments is much more liberal than in England. Those courts while professing to adhere to the rule, that the plaintiff shall not by his amended bill make a new case, have allowed so many departures from it that it is *now scarcely susceptible of any very accurate definition.*

"For example: In *Philhower* v. *Todd*, 3 Stock. R., 54–312, it was held, even after a hearing upon a motion to dissolve an injunction and the delivery of the court's opinion, that the injunction should be dissolved and the bill dismissed, the injunction might be retained and the party permitted to amend by altering the frame and the averments of his bill.

"In *Buckley* v. *Corse*, Saxton's R., 504, the bill charged that the plaintiff had title to the premises *older than the defendant's mortgage*, but that under the belief that the mortgage was prior to his estate, the plaintiff had agreed to pay it, and had advanced large sums on that account. The bill prayed for an account of the moneys thus paid. Upon the coming in of the answer denying the allegations of the bill, the injunction was dissolved. Afterwards the complainant had leave to amend by making it a bill *to redeem the defendant's mortgage*. See *Henry* v. *Brown*, 4 Halst. Ch. R., 245; *Harris* v. *Knickerbocker*, 5 Wend. R., 638; S. C. 1, Paige's R., 209; *Bellows* v. *Stone*, 14 New Hamp. R., 175; *McDougal's adm'x* v. *Williford*, 14 Geo. R., 668: *Neale* v. *Neales*, 9 Wall., U. S. R., 1.

"It is, however, unnecessary to multiply these citations from foreign courts, when we have cases so much nearer home.

"In *Anthony* v. *Leftwich's Rep.*, 3 Rand., 238, the bill was filed for specific execution of a contract relating to land. This court was of opinion, upon the pleadings and evidence, it was not a case for specific performance. It, however, remanded the cause to the Circuit Court, with leave to the complainant to make new parties, and claim compensation for the improvements he had made on the land.

"In *Parrilly* v. *McKinley*, 9. Gratt., 1, the bill was for specific performance, and the plaintiff was permitted to file an amended bill asking for a recision of the contract. If these cases do not show that the plaintiff was permitted to make a new case, they at least show that he may by his amendment, so alter the frame and structure of his bill as to obtain an entirely different relief from that asked for originally. This is

founded upon good reason. Why should the plaintiff be put to a new bill for different relief upon the same transaction when the object can be accomplished by an amendment." * *

In *Daniel's Chancery Practice*, First American Edition, page 454, it is said that the practice in regard to amending bills, is as follows:

"When a plaintiff has preferred his bill, and is advised that the same does not contain such material facts, or make all such persons parties as are necessary to enable the Court to do complete justice, he may alter it, by inserting new matter subsisting at the time of exhibiting of his bill, of which he was not then apprised, or which he did not think necessary to be stated, and may add such persons as shall be deemed necessary parties; or in case the original bill shall be found to contain matter not relevant, or no longer necessary to plaintiff's case, or parties which may be dispensed with, the same may be struck out; and the original bill, thus added to or altered, is termed *an amended bill*."

END OF QUOTATION.

We also relied upon the able opinion of Mr. Justice Gray, in the recent case of *In Re Sanford Fork and Tool Co.*, 160 U. S., 255, and on the cases listed upon pp. 125–126 of our opening brief.

We quote further from our brief filed before the Circuit Court on the plaintiff's application to amend.

QUOTATION.

Counsel for defendants contend in their note that the plaintiff ought not to be allowed to amend because, in their opinion, his original bill contains admissions which they should be allowed to use against him. Here we have an illustration of the willingness, indeed the purpose, of the defendants to twist the language of the bill to the detriment of the plaintiff and to their advantage, and also a demonstration that the complainant should be given an opportunity to correct or to guard

against any possible misconstruction of his language, before the argument of the demurrers or the filing of an answer by the defendants. The complainant has therefore asked in his petition for leave so to amend, that sub-division VII of his original bill may have inserted therein a paragraph in the following words:

"And your orator here takes occasion to state that he applied for and obtained leave of court to amend his original bill, by emphasizing the openness, publicity and fairness with which said contract was carried into effect before the City Council and its committees; not because he considered his said bill, fairly construed, as being defective in this regard, but because it contained some loose and careless expressions which might be attempted to be twisted into an admission that something other than proper and legal influences and the utmost candor and publicity was intended or practiced in the making and carrying out of the said contract of August 9, 1895."

In *Finley* v. *Lynn*, 6 Cranch, 238, the 2d paragraph of the syllabus is as follows:

"The complainant in equity may have relief even against the admissions in his bill."

This yet further illustrates the liberality of Federal Practice; but in the case at bar the plaintiff has made no such admission as the defendants, by torturing and twisting his language, have attempted to attribute to him. Even if ground existed for plausibly torturing and twisting the phraseology of the bill, how would the defendants be injured by allowing the plaintiff to amend and to state with clearness and precision the case he expects to prove by his testimony? If that case, so stated, be not liable to demurrer, the defendants can set up their defense thereto by plea or answer, and when proofs are taken, what will hinder them from introducing, as a part of their testimony, any supposed admission contained in the original pleadings remaining on file in this cause? To ask these questions is to answer them.

On the other hand, if the plaintiff should not be allowed

to amend his bill, and it should by possibility be dismissed on demurrer because of his failure to amend as prayed in his petition, he will thus have been cut off from proving his actual case, by the ingenuity of the defendants in distorting his language into a meaning which he never intended to convey. That is to say, the defendants, by their construction of his language, will have made for the plaintiff a case different from his actual case, and different from the case he intended to state. Can it be, that a court of equity will even run the risk of doing such injustice; and that, too, under a practice as liberal as the equity practice of the courts of the United States, at a stage of the proceedings before demurrer sustained or answer filed, and while the plaintiff is respectfully claiming his right to amend under the broad charter and protection of Rule 29?

In the view we take of this matter, if the defendants have *any right* to resist the application of the plaintiff under Rule 29 to amend his pleadings as prayed in his petition—the grounds upon which they can pretend to do so with even the slightest show of reason are two only—to-wit:

First. That the plaintiff has already prostituted or proposes now to prostitute his right or his grace of amendment for the purpose of delay; and

Second. That his bills, as proposed to be amended, will make a case legally distinct from the case made in his bills already filed.

In opposing the *first* suggestion we feel it necessary only to disclaim in behalf of our client as well as ourselves the purpose or motive attributed to us in making this application, and to request your Honor and opposing counsel to note that the filing of the first amended bill was rendered necessary by the action of the defendants *pendente lite*, and that the very first appointment for the argument of the demurrers in the cause has not yet passed.

In reply to the *second* suggestion, we need only call atten-

tion to the authorities herein above cited upon the point involved, in all of which the proposed amendments were allowed and in every one of which the bill as amended was far more widely differentiated from the original bill than our bills, as proposed to be amended, are, or can be differentiated respectively from the original and amended bills now on file in the cause. In this connection, it is too plain either to require statement or to admit of denial, that the *object* of the suit, as brought and as thus far and now proposed to be amended, is the same, to-wit: the enforcement of the contract rights of our client to a one-half interest in the Traction franchise and enterprise; that the *basis of fact* upon which this is claimed is, throughout all the bills, the same; and that the *relief* sought in the original and amended bills, respectively, as now proposed to be amended, is identically the same with the relief sought in the bills now on file in the cause.

It may be well to note that the italics used in the passages quoted from the reports, are those of counsel, and will not be found in the opinions as reported in the books. Also that, while one of these opinions quoted from the Supreme Court of the United States, drew a definite discrimination between amendments *under Rule* 29, and amendments *at later stages* of a cause—holding that the *former are of course and of right*—and the *latter under the discretion of the Court*—the other opinions (or other opinion), which referred to *all* amendments, as being subject to such "discretion," were rendered in cases where the applications to amend were actually made, late in the history of the causes, and after Equity Rule 29, ceased to have any application.

But, if your Honor shall be of opinion that the application of the plaintiff to be allowed to amend, even at this early stage of the cause, is one to be granted or denied in your discretion, then we humbly, but confidently press upon the consideration and the grace of the Court, the strong reasons herein above suggested, why the prayer of our petition should not be denied.

End of Quotation.

We respectfully submit, that the language stricken from the original bill is as completely out of the record, upon consideration of the demurrer to the second amended and supplemental bill, as if the omitted words had never appeared in the original bill. It would be idle to allow amendment of pleading, and then hold that the amended pleading may be considered as it stood prior to amendment. No such rule prevails in the courts of the United States. No such rule is sanctioned in chancery practice. The greatest liberality should prevail in allowing the plaintiff to note his case; to state with clearness and precision the case to which he intends to direct his testimony, the case he expects to prove: and, if he has used language which by possibility might be construed to carry a meaning he did not intend to convey, to make the proper correction and employ language free from all ambiguity. If the rule were otherwise, the ingenuity of defendant's counsel, in giving to the words used a meaning never intended by the pleader, would enable the defendants to make for the plaintiff a case different from his actual case, different from the case he intended to state, and to which his proofs will be directed. If the allowance of amendments is discretionary with the trial court, as this court has so often declared, then such a miscarriage of justice can always be averted.

Each case depends upon its own circumstances and surroundings as disclosed to the trial court, and of which the appellate court can never become so fully possessed as the trial court.

The language of Mr. Justice Livingston in *Marine Ins. Co.* v. *Hodgson*, 6 Cranch, 214, already above quoted, is strikingly apposite. That learned jurist said: "The court does not think that the refusal of an inferior court to receive an additional plea, or to amend one already filed, can ever be assigned as error. This depends so much on the discretion of the court below, which must be regulated more by the particular circumstances of every case, than by any precise and known rule of law, and of which the Superior Court can never be fully

possessed; that there would be more danger in revising matters of this kind than what would result now and then from an arbitrary or improper exercise of this discretion." * *

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20 Cal., 182.

Subject: Withdrawal of Competition—Amendment of Pleadings.

Amongst the authorities cited by the defendants—page 29 of their brief—under the head "Withdrawal of Competition," is the case of *Swan* v. *Charpenning*, 20 Cal., 182, which was an action upon a contract providing for the withdrawal of a bid for a mail route (to be awarded to the lowest bidder), in consideration of an interest in a longer route—which the plaintiff was to induce the Government to give to the other contracting party—or equivalent money compensation. The contract was held void, as against public policy.

The case is doubly instructive. In the first place, it responds perfectly to the test herein below suggested as applicable to cases of this character. The opinion of the court expressly states that "The agreement was entered into for the accomplishment of a project of which *the Government was ignorant*, and whether or not withdrawal would be detrimental, was a matter of conjecture only. The Government *was not consulted*, and, so far as appears, the Department intrusted with the management of these affairs *neither knew of the agreement nor assented to the withdrawal*" (italics ours).

But the case is yet more interesting, in its bearing upon the power and practice of the courts *in allowing amendments*, upon *the effect of amendments* when allowed, and upon what we have characterized as "*the remarkable position of the defendants*," to-wit: that the amendment in this case was improperly granted, and that, even if properly granted, the questionable or objectionable features stricken out of the original bill may still be made the basis of demurrer to the amended bill.

Upon petition for rehearing, Cope, J., said, **Field, C. J., concurring**:

"The petition for a rehearing in the case must be denied;

but, as the counsel for the appellant thinks that the complaint can be amended so as to avoid the objection upon which we directed a dismissal of the suit, we shall modify our judgment in that respect. The judgment will be so modified as merely to affirm the order appealed from, and the court below, before proceeding to retry the case, may allow such amendments to the complaint as shall appear to be proper, in view of the opinion expressed by us upon the validity of the contract as set forth in the complaint as it now stands.

"Petition denied, and judgment modified as above stated."

All this, be it noted, *after*—ruling of the court upon the question, verdict of the jury upon the case, new trial granted, appeal, affirmation, and direction to the lower court to dismiss the suit.

We submit then, upon the *preparatory* or *introductory* branch of the case, determining *the basis upon which* the points involved in the demurrer, are to be considered and discussed, that,

1st. This Honorable Court will not review the discretion exercised by the Honorable Circuit Court, in granting the plaintiff leave to file the last amended bill.

2nd. Even if the exercise of that discretion were reviewable by this Court, yet the exercise of that discretion and the granting of that leave were proper, in view of the character of the amendments proposed and the stage of the cause at which the leave to amend was asked.

3rd. Either or both of these positions being sound, the demurrer must be considered and discussed with exclusive reference to the last amended bill, and by this test it must stand or fall.

Approaching now the argument proper, we remark at the outset, that, while the formal abstract of their argument, on page 18, embraces nominally some *five* points, exclusive of the

introductory point above discussed, yet even a casual examination of their brief, will show beyond peradventure that,

The Defendants Concur with the Plaintiff as to the Real Questions, or rather the Real Question, before the Court.

The *seventeen* pages of their "statement of the case," are consumed in the effort **to find a basis for the public policy defence**, and the following *eight* pages, involving the introductory discussion as to the right to use the statements stricken from the original bill, have no other purpose.

This brings us to page 26 of their brief, which thereafter, down to the middle of page 61, is taken up with the direct discussion of the law of **Public Policy**, as bearing upon and invalidating the contract of August 9th, 1895. Thus *sixty-one* pages of the defendants' brief are devoted to this point, and only *twenty-one* to the other four points nominally discussed.

It is further noticeable, that only *three and one-half* (3½) *pages* are given to the discussion of **Remedy at Law.**

We now come to the discussion of the *five* grounds of demurrer which have so far survived the conflicts of this litigation that our opponents are willing to bring them before this honorable court. Following the order of their brief (see page 18), let us take up first the great question of

PUBLIC POLICY,

upon which, as all the briefs filed herein indicate, both sides consider the fate of the demurrer really depends.

In our view, the most vital proposition of our argument, the weight of which, in favor of the plaintiff, *especially upon demurrer*, can scarcely be exaggerated, is the

PRESUMPTION IN FAVOR OF THE VALIDITY OF CONTRACTS.

We confess to no little surprise that, on page 16 of their brief, counsel for the defendants not only admit the soundness

of this canon, but assert its fundamental and axiomatic character with a vigor bordering even upon discourtesy, declaring that "This canon of construction is familiar to every tyro in the profession." And, not content with this emphatic approval and concurrence, they lay down another "rule of law," which they are very much mistaken in presuming that we are disposed to contest, to-wit: that "if it clearly appears that the contract sought to be enforced is illegal * * * the presumption of legality is overcome, and the contract cannot be enforced by the courts;" which is very much as if it should be said: If it clearly appears that a man is guilty, the presumption of innocence is overcome, and he cannot be acquitted of the charge.

THE TEST OF ILLEGALITY.

We beg to assure the learned counsel, however, that we are entirely satisfied with their amendment of our canon. We not only accept it, but we return thanks for it, and respectfully press it upon the attention of the court. **"If it clearly appears * * * that a contract is illegal!"** Yes, this is the test in cases involving the validity or invalidity of contracts with reference to public policy; this is the test, applicable indeed in all stages of the cause, but specially appropriate *upon demurrer*. The illegality, the violation of public policy, must "clearly appear," else the contract will be pronounced valid. The court will bear with us if we once more suggest a disposition of this case—in brief and complete in itself—by bringing together the test and touchstone thus submitted, with the concurrent endorsement of counsel on both sides, to-wit:

THE ILLEGALITY, THE VIOLATION OF PUBLIC POLICY, MUST CLEARLY APPEAR.

And, side by side with this, the proposition or question more than once propounded in our opening brief—

"Is it necessarily contrary to Public Policy for two rival applicants for a Legislative charter to unite, and agree to ask the grant of the franchise to them jointly, going openly before the Legislative body and making a full disclosure of their contract and co-operation?"

We confess to a strong inclination to leave the **public policy** defence, with this short statement superadded to the elaborate discussion in our first note, which we do not consider to have been seriously affected by the ingenious brief of the defendants; largely because, as we conceive, the defendants have made a great mistake in basing their argument almost exclusively upon the statements stricken from the original bill, though, it is fair to add, under the stress and pressure of the evident hopelessness of their case upon the amended bill.

It will, perhaps, be more respectful, however—possibly also more prudent—to reply a little more *in extenso* to the handsome argument of our friends. Therefore, let us consider briefly the *first* of the two grounds upon which the defendants claim that the contract of August 9, 1895, is violative of public policy, to-wit:

WITHDRAWAL OF COMPETITION.

It would be worse than useless to wade through all the cases cited by our learned opponents under this head, and to attempt to deduce from them a harmonious view as to the true test between such contracts for the 'withdrawal of competition,' as are necessarily invalid, and such as are, or may be, valid. The tests proposed are almost as numerous as the decisions. In some cases, the effect of the withdrawal is emphasized; in others, the "necessary" or "inevitable" tendency of the contract; in others still, the object or intention of the parties. But it is not well to waste time upon the reduction of out-works. Let us advance at once upon the citadel of our foes. Upon page 40 of their brief, after giving numerous extracts from the cases, and attempting to exclude the case at bar from the protection of a certain class of authorities cited by us, the learned counsel for the defendants print the following in italics and capitals, as their analysis of the contract in this case, and demonstration of its illegality, to-wit:

"*Men may lawfully combine to purchase what individually they*

can not or would not buy, or to acquire and exercise a public franchise under similar circumstances. Such combinations everywhere appear in the conduct of public improvements. But, where two or more persons, or sets of persons, ONCE COMPETE for a public franchise, and AFTERWARDS WITHDRAW competition in order to obtain the franchise on better terms for themselves, IT IS ILLEGAL."

The proposition proves too much. Its vice is that it takes no note and makes no exception of a class of cases characterized by a feature which undoubtedly, as we view the matter, removes them from the operation of the rule laid down by the learned counsel—a feature, we may add, peculiarly prominent in the case at bar—implied, to say the least, in the original bill, but expressly asserted and emphasized in the amended bill.

We refer, of course, to the feature and the fact that—

The entire understanding between the parties to the contract of August 9, 1895, the basis of their contract, co-operation and joint application, was fully disclosed to the Legislative body which had in its power the granting or withholding of the franchise.

Whatever may fairly be said, to the effect that secrecy or concealment is not a necessary element in the illegality or invalidity of a contract for "Lobby Services," it is hardly too much to say that it is in the nature of things inconceivable that there should be a vicious, illegal and invalidating "Withdrawal of Competition," for a public franchise, where a clean breast is made of the entire matter to the dispensing Legislature. Is it true—is the Court prepared to declare (for to this extent and this extreme goes the proposition of the defendants)—that competition for a Legislative charter cannot be legally and validly terminated *by a grant of the charter to the rival applicants jointly*, even though they make a full and candid statement of their agreement and co-operation to the Legislative body, which of course, has had before it both competing propositions, or proposed charters, and is under no obligation

to grant the charter to either side, or even to both conjointly? We do not believe this great tribunal is prepared to announce any such doctrine as this, and if not, there is an end of the matter.

It does not then, "clearly appear," that the contract of August 9th, 1895, is necessarily illegal. If indeed it be susceptible of two constructions, *one* of them is certainly the natural, simple, clean and healthful understanding and agreement we have just above suggested, and therefore the contract of August 9th, 1895, **upon demurrer at least**, will be declared *not* obnoxious to the law of Public Policy, as contemplating a secret, harmful, and unlawful withdrawal of competition.

The opinion of the honorable District Judge, sitting upon appeal in the Circuit Court of Appeals, upon this branch of the case (see printed record, pages 142–145), is so apposite, so balanced, so compact with wise suggestions, and with points we desire to make, but feel unable to make so briefly or so well, that, at the risk and cost of repetition, we beg leave here again to quote it, and with it to close what we have to say upon the "**Withdrawal of Competition.**"

EXTRACT FROM JUDGE BRAWLEY'S OPINION.

"It is not contended, nor can it be assumed, that Hyer or Sheild, either or both, had such control or monopoly of the building of street railways that they could by combination put up the price or demand an unusual or unreasonable franchise or embarrass the city of Richmond, and thus injure or jeopardize the public interest, either by their action or non-action. A rule that might be justly applicable to a kind of business which could not be restrained to any extent whatever without prejudice to the public interest, ought not to be arbitrarily extended so as to interfere with that freedom of contract which is a fundamental right.

"The franchise in question was not a thing that was put up at public auction and bound to go to the lowest bidder, where a combination to chill the bidding might be held to be in contravention of the public interest. The City Council of

Richmond, faithful, as it must be assumed, to its obligations to the public, was not bound to give the franchise to this or any other combination except upon such terms as it chose to annex, and there was no agreement for any corrupting influences to affect its action. An honest co-operation between two parties to effect an object which neither could accomplish by itself is not forbidden, although, in a sense, that might tend to lessen competition. There is a competition that kills, as there is a combination that saves. Competition in itself is not invariably a public benefit, and to hold a contract void because its tendency may be to defeat competition, it must appear that the benefit to be derived from it is certain and substantial, and not theoretical and problematical. The rivalry of impecunious promoters in the obtaining of a franchise for an important public work requiring large capital for its fulfillment is not of such certain advantage to the public that the law should be invoked to prevent its suppression. *When such men discover a field where capital can be profitably employed, and, seeking its aid at the same source, are informed that the money necessary to develop it can only be obtained upon the condition of their joint cooperation, and they voluntarily combine in furtherance of the enterprise, and there can be no objection to it if is done honestly and in good faith.* Unless such a contract, either on its face or viewed in the light of the circumstances surrounding it, clearly discloses the fact that improper means and influences are to be used to accomplish the desired end, it should be sustained. 'If there is one thing,' says Sir George Jessel in a recent case, 'which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice.'

"All presumptions are in favor of the legality of contracts—all reasonable intendments are indulged to support them—if capable of a construction that will uphold and make them valid, they are not to be held illegal unless the circumstances are so strong and pregnant that no other reasonable conclusion

can be drawn from them, for intention to violate the law is not to be presumed. * * * * * * * *

"Public policy requires that men should perform their contracts, and they ought not to be allowed to evade their obligation upon vague and shadowy grounds. If this were a proceeding on the part of the City of Richmond to vacate the charter, on the ground that it was obtained by any corrupt practices or by the suppression of fair competition, the court should lend attentive ear to every suggestion of improper conduct on the part of the promoters, but the judicial conscience should not be awakened for the protection of one who seeks to avoid a contract, of his own seeking, on the ground that it was immoral, and, therefore, that he has the right to make off with the swag." (Italics ours.)

Upon page 27 of their brief, counsel for the defendants say:

"It is contended for the demurrants that the contract sued on is plainly Against Public Policy. And this on two grounds, its stipulation to withdraw competition already existing for the grant of a franchise in which the public is interested, and the unlawful manner in which the parties were to obtain and enjoy said franchise."

We have discussed the *first* of these grounds; the *second* is condensed by the defense on page 43 of their brief, in the single word,

LOBBYING.

No Contingent Compensation in the Case at Bar.

We fail to recognize even a decent amount of plausibility in the assumption of the learned counsel that this case belongs to the class in which contracts with agents to secure the passage or defeat of legislation, in consideration of "compensation," "contingent compensation," "high contingent compensation," has been held void, as violative of sound public policy.

The principle of these cases is clear and is embodied in

statute in many of the States of the Union. It is that these agents, having no original interest in the subject matter of the bills advocated by them, but being interested only for pay, appear habitually in a false character and gravitate naturally toward false and improper methods. A bad odor has gathered about this class of men who make a business of legislation, the purity of which, and of public business generally, has suffered greatly at their hands; so that both courts and legislatures are properly on their guard against them.

Yes, the origin, the principle, and the gradual extension and development of this class of cases are clear enough and sound enough; but we say again, as we have said before, that *it is a misuse of language to classify the case at bar with cases of this character.* Neither Hyer nor Sheild was, in any proper sense, an agent working for pay. On the contrary, so far as the record shows, Hyer and Sheild and their associates simply agreed to co-operate in the prosecution and development of their own joint project and enterprise, with the chance of failture or success which all men in all the enterprises of life must encounter. We submit, therefore, that the great array of cases cited and quoted in the brief of the defendants, on pages v and vi and 43 to 45 *et seq., repudiating and invalidating contracts involving compensation to agents for lobby services*, is altogether inapplicable and irrelevant.

This suggestion disposes of the following cases:

Tool Co. v. *Norris*, 2 Wal., 45.
Trist v. *Child*, 21 Wal., 441.
Meguire v. *Corwine*, 101 U. S., 108.
Oscanyan v. *Arms Co.*, 103 U. S., 261, 269, &c.
Clippenger v. *Hepbaugh*, 5 Watts & S. (Pa.), 315.
Mills v. *Mills*, 40 N. Y., 543, 546.
Rose v. *Truax*, 21 Barb. (N. Y.), 3.
Harris v. *Roof*, 10 Barb. (N. Y.), 489.
Powers v. *Skinner*, 34 Vt., 274, 281.
Bryan v. *Reynolds*, 5 Wis., 200.
Elkhart Co. Lodge v. *Crary*, 98 Ind., 238.

Sweeny v. *McLeod*, 15 Oreg., 330.
Ormerod v. *Dearman*, 100 Pa. St., 561.
Spalding v. *Ewing* (1896), 149 Pa. St., 379.
Houlton v. *Dunn*, 60 Minn., 26.
Wood v. *McCann*, 6 Dana (Ky.), 366.
Yates & Ayres v. *Robertson & Berkeley*, 80 Va., 475.
Fuller v. *Dame*, 18 Pick., 472.
Edgerton v. *Brownlow*, 4 H. of L. Cases, 1–255.

Many of these decisions are inapplicable upon other grounds also, while not a few are authorities actually favorable to the plaintiff. The remaining citations of the defendants under this head, not disposed of by the above suggestion, are nearly all of them, by their character and circumstances, differentiated widely and clearly from the case at bar. But there are two or three which perhaps require further notice.

The case of *Chippewa Valley, &c., R. R. Co.* v. *Chicago, &c., R. Co.*, 75 Wis., 224; *S. C.*, 6 L. R. A., 601, is cited at least three times in the brief of the defendants, on pages 39, 46 and 49, and, was below and is here, emphasized as one of the most apposite and conclusive authorities against the plaintiff to be found in the books. At pages 46–47 of their brief in this court, the defendants say of this case:

"The circumstances were remarkably like those in the case at bar. A contract was made by two railroad companies, whereby one agreed to refrain from any effort to obtain a grant of land from the Legislature, and to aid the other company to procure it 'by all reasonable and proper assistance,' in consideration of a share of the grant obtained. The contract was declared to be void as against public policy. Cassoday, J., delivered the opinion of the court in an able and exhaustive review of the authorities on the subject, to which this court is respectfully referred, and which saves us from further wearying it with extracts from the case cited by us."

And on page 49, the learned counsel again refer to this favorite authority, as follows:

"The contract was that one company should cease nego-

tiation for a land grant, and should render to the other 'all such reasonable and proper assistance as they should be able to give in the premises,' to enable the other company to obtain the grant. And as a consideration, the company so rendering assistance, was to share in the grant after it was obtained. Surely the words 'co-operate in securing a franchise,' used in the said contract of the 9th of August, 1895, are much broader and more liable to abuse in operations under them than the above, and are not restricted by the terms 'reasonable and proper assistance.' Yet in that case, when it was urged that a presumption existed in favor of its legality, and among other grounds, that the assistance might have been publicly given, and in legitimate ways, the court held that the contract was in itself against public policy, and for that reason must be held void, although it might have been and actually was complied with by lawful means."

In view of these strong and impressive statements, the court will pardon a somewhat extended analysis of this case, upon which the learned counsel count and rely so largely, and which is—evidently in their view, perhaps in ours also—their strongest authority under this head; but which yet, as we understand it, in no way affects adversely the position of the plaintiff in the case at bar.

The facts of the case are as follows:

Certain acts of Congress gave grants of land to the State of Wisconsin, amongst other purposes for the construction of a railroad between certain points named. The Legislature of the State granted the lands to the Omaha Company, to carry out the purposes of Congress; but the grant was secured partly through the efforts of other companies who agreed not themselves to apply for the grant, but in every way to aid the Omaha Company to secure it—upon condition that one-fourth, when secured, should be turned over to them. This arrangement between the companies was not made known to the Legislature. The syllabus of the case is as follows: "A contract by railroad companies to refrain from any effort to obtain a

grant of public lands from the Legislature, and to aid another company to procure it by all reasonable and proper assistance, in consideration of a share of the grant obtained by the latter, is void as against public policy." On page 609, the court states the essential grounds of its decisions as follows: "In bestowing the grant the Legislature were executing a trust imposed upon the State by Congress. The Legislature had no power to pervert that trust, nor any part of it, even for the benefit of the State, much less for the benefit of a railway corporation, upon which no part of the grant had ever been conferred, and which owed no duty in the construction or operation of the road in aid of which it was granted. The object of such grant was not only to aid in such construction, but to insure its continued operation. But to sanction such a contract so perverting one-fourth of the grant, might, in a supposed case, leave the contracting party insolvent and without any ability to successfully operate the road. Since the intention of the Legislature is only ascertainable from the grant itself, it necessarily follows that they intended to bestow the grant on the Omaha Company alone. To sanction the contract, therefore, would be to defeat the expressed intention of the Legislature, and to allow the parties to the contract, in advance of the construction of any portion of the road, to parcel out the grant to suit themselves, when, as a matter of fact and law, the trust could only be executed by the Legislature itself, in the name of the State, as a naked trustee, acquiring all of its powers to act at all, directly from Congress."

It is noticeable that the judge who delivered the opinion subsequently appended thereto a note, calling attention to the Statute of Wisconsin making it a criminal matter for any person to attempt in any manner to influence any member of the Legislature for or against any measure, without first making known to said member the real and true interest he had in such measure, either personally or as agent or attorney. The judge very pertinently adds that, since the making of the agreement was punishable criminally, it was idle to contend that it might be specifically enforced in equity: that, if corpo-

rations should be allowed to give or receive money or property for such services, then the privilege should be limited to such corporations as might be chartered especially for that purpose; "for, in that event, they would, in the spirit of the latter clause of the section cited, appear in their true character, and thus enable unwary members of the Legislature, as well as the public, the better to guard against their approach or to escape their allurements altogether."

May we not confidently assume that enough has been said as to this case? Would the opinion have been applicable, could the decision have been rendered, if all the companies concerned had come openly before the Legislature (as the parties did in the case at bar), asking that they should be amalgamated into one company, and that the grant be made to this new company? Is it not evident that, by this course, all the vicious and invalidating elements would have been banished from the case?

43 Cal., 11.

Subject: Contract Against Public Policy.

Nearly in line with this case is the case of *Powell* v. *Maguire*, 43 Cal., 11, which, though in this court and this connection merely *cited* (see lists of authorities, pages v and 45 of defendants' brief), was, we think, more confidently relied upon and pressed in the courts below, than any other case, as an analogue of the case at bar, in its relations alike to the law of Public Policy and of Equity Jurisdiction. Indeed, on page 62 of defendants' brief in this court, it is said—"The two cases are as much alike as the two Dromios."

It is true that, when read hurriedly, the apparent resemblance between the two is striking; but when closely examined it is seen that the case of *Powell* v. *Maguire* was a gross and palpable instance of an impudent claim for compensation for "lobby services"; and, moreover, that it was kept "secret" from the Legislature "who the real parties in interest were." On page 13 it is stated that "His whole claim was based upon

the influence, or pretended influence, exerted by him upon the State Senator from that district, in procuring the passage of the bill, but there is nothing to show anything like a partnership between the parties. On his own statement the most he could claim was a half interest in the franchise for "lobby services"; on page 14, that "the rights asserted by the plaintiff were founded in illegality, in that they were based upon a combination to exercise improper influences upon the Legislature in the discharge of its duties"; on page 18, that "the plaintiff through his friendly relations with the senator from that district, was chiefly or wholly instrumental in procuring the franchise to be granted"; on page 21, that "It may be that, if the Legislature had known beforehand who the real parties in interest were, they would not have made the grant; and if the courts could be appealed to, to enforce such secret antecedent agreements, unsupported by any subsequent acts of the ostensible beneficiary, it is evident that powerful secret combinations would be formed to procure vicious legislation under false pretences. What might appear to be a harmless or beneficial enterprise under the control of one person of good character, might prove to be a very dangerous and pernicious scheme in the hands of twenty secret associates of bad character, and to whom the Legislature might have refused to make the grant, if their interest had been disclosed on the face of the bill." We do not deem it necessary further to discuss this case.

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4 H. of L. Cases, 1–255.

Subject: Contract Against Public Policy.

Edgerton v. *Earl of Bronndor*, 4 H. of L. Cases, 1–255, which, in the several arguments below, seemed to be very much relied upon by the defendants, and is referred to several times in their brief filed here (see pages 38, 50, &c.), was a case in which agents were to be paid large sums of money for carrying out the trusts of a will providing for *the purchase of peerages*. But for the lofty character of the tribunal which rendered

the decision, and the evident estimation of it by the learned counsel for the defense, we would not even deem it necessary to refer to the case.

True, the disquisitions upon Public Policy by the great Law Lords who took part in the debate are masterly; but the case is differentiated so widely from that at bar that these statements of general principles cannot be considered as having much weight in the determination of the latter. Perhaps no one of these great lawyers and judges was abler or more experienced than Lord Chief Baron Pollock, who, on page 149, thus epitomized the case and the subject: "The conclusions to which I have arrived from the decided cases and the principles they involve, are that all matters relating to the public welfare—all acts of the Legislature or the Executive—must be decided and determined upon their own merits only, and that it is against the public interest (and therefore not lawful) for any one officiously, wantonly and capriciously, without any motive but his own will, to create any pecuniary interest or other bias of any sort, in the decision of a matter of a public nature, and which involves the public welfare, the party creating that interest having no special and particular individual interest in the subject matter with which he intermeddles."

Could there well be conceived an epitome of a case more widely distinguishable from the case at bar, or a statement of principles more entirely inapplicable to it?

But why prolong this discussion of particular cases? Not only is there, properly speaking, no contingent compensation, no paid agency, here, but there are

No Lobby Services in the Case at Bar.

We do not admit that, even in the original bill, there is any recognition of *lobby services* as contemplated by or rendered under the contract of August 9, 1895; but we do most emphatically assert that, outside of certain loose expressions stricken from said bill by amendment, there is nothing in the case upon which to base even a plausible argument that *lobby services* were ever contemplated or ever rendered by either of

the parties to said contract. Certainly, the facts set out in the last amended bill give no color to the charge.

As we have seen, the test, the defendants' own test, is that **the illegality must clearly appear.** It is interesting to note how, after all their labored argument upon this branch of the case and very near the close of it, the learned counsel wince under the pressure of this test, and recognize the hopelessness of their case upon the amended bill.

In the last paragraph of page 51 of their brief, and in the following words, they sound again the old battle-cry with which they opened the fight:

"But the statements in the original bill turn a flood of light on the services agreed to be performed, and clearly show that they were what is known and condemned by the courts as *lobbying*, and that such services were actually performed on behalf of the petitioner."

Thenceforward, to the very end of their discussion of this head, they comfort themselves with liberal quotations from the original bill, and most liberal construction of them.

Our friends are welcome to all the comfort they can derive from this mode of viewing and discussing the case. Meanwhile, we invoke the defendants' test of the legality of the contract, we apply it to the amended bill, and upon this basis we confidently reiterate, with merely formal modification, the proposition which we laid down at the outset, to-wit:

It is not necessarily, nay it cannot possibly, be contrary to public policy for rival applicants for a Legislative charter or franchise to unite, and agree to ask the grant of the franchise to them jointly, going openly before the Legislative body and making a full disclosure of their contract and co-operation?

The *second* of the two questions which the law of Public Policy propounds, when applied to the facts of the case at bar, is this—

Whether, after a contract contrary to public policy has been consummated, and the franchise or other benefit contemplated in such contract has been secured, and one party has appropriated all the benefit, and the other seeks justice at the hands of the court and a fair division; whether, we say—under such circumstances—a court of equity and of conscience will entertain and approve the plea of the wrong-doer, that the original contract was immoral or invalid?

It will not be over looked that this question demands no answer at our hands—unless and until the contract of August 9th, 1895, shall be declared violative of a sound Public Policy, which we do not believe will ever occur.

The brief of the defendants concedes the law laid down in *Brooks* v. *Martin*. Indeed, it cannot well be questioned, having been, as we showed upon page 90 of our first brief, reiterated in many decisions of this honorable court: but the proposition of the defendants is (page 53 of their brief):

This case not within the class of contracts represented by *Brooks* v. *Martin*.

The learned counsel attempt to establish this position by formulating what they consider to be

THE TEST,

the distinction upon which the cases have turned, to-wit:

"*If the ground of relief is a contract subsequent to, and independent of, the illegal contract, and not requiring the enforcement of the illegal contract, it may be enforced.*" (P. 54.)

We do not care to enter again into this hair splitting discussion, but respectfully refer to our views—as to what this "contract subsequent to and independent of the illegal contract," so frequently referred to in the authorities, really is—which views are fully stated on pages 89–91 of our brief. We beg leave, too, again to call attention to the very able discussion of this entire subject in *Gilliam* v. *Brown*, 43 Miss., 641–666; and to *Planters Bank* v. *Union Bank*, 16 Wal., 483–500, especially paragraph 5 of the syllabus and last page of the

opinion, in both which passages this honorable court gives expression to its recognition of the fact that its "doctrine" on this subject is in advance of that of many courts; yet adheres to it in full view of this state of things—the paragraph of the syllabus referred to, beginning "Though an illegal contract will not be enforced by courts, yet it is the doctrine of this court that * * * :" and the passage from the opinion, reading: "We are aware that *Faikney* v. *Reynous* and *Petrie* v. *Hannay* have been doubted if not overruled in England, but the doctrine they assert has been approved by this court."

We stand, then, upon the doctrine of this honorable court, announced in repeated decisions, and upon our understanding of it, which, in the language of *Planters Bank* v. *Union Bank*, is that, where the illegal contract has been already executed and the illegal object already accomplished, *the money, or thing which was the price of it*, may be a *legal consideration* between the parties for a promise *express* or *implied*: and *this* is the "subsequent and independent contract" so often and so glibly referred to in the authorities

We cannot believe that the learned counsel for the defence have failed to apprehend this view of the authorities: for, upon page 56 of their brief, they seek to escape it, by attempting to force an analogy between the conduct of Sheild, in repudiating the obligations of himself and associates to Hyer and associates, and a hypothetical case put by Mr. Justice Miller in his opinion in *Brooks* v. *Martin*. Said that great Judge: "If Brooks, *after the signing of these articles* of partnership, had said to Martin, 'I refuse to proceed with this partnership because the purpose is illegal,' Martin would have been entirely without remedy." And thereupon, say the learned counsel, "Sheild refused to proceed with the contract of 9th August, 1895, which is illegal, before its consummation, and the defendants have never admitted or assumed any liability under it," &c., &c.

The position seems to us at once monstrous in morals and impotent in law. Passing by the fact that Sheild did not intimate the slightest shrinking from the contract because of its

immorality or illegality, as Brooks is supposed to have done—passing by, we say, the view and purpose with which Sheild repudiated the obligations of himself and associates—how can any one fail to perceive and to appreciate the difference in time and circumstances under which the repudiation takes place in the two instances. Brooks refuses at the outset, at the threshold: as his Honor puts it, "*after the signing of the articles*," but, of course, presumably *before* the execution of the contract began. Sheild repudiated *after the entire consideration which was to pass from us was in his hands*, and we were stripped and powerless, bound hand and foot. There is no more analogy between the supposed action of Brooks and the real action of Sheild, than there would be between the conduct of a man who refuses to enter my house with another for the purpose of robbery, and the conduct of a burglar who, after robbing my house in company with another, refuses to share with his comrade the plunder they have together secured.

As Lord Macnaghten said of Solicitor Howe, in the Nordenfeldt case, the defendants pleaded that their contract was against public policy, but they forgot to return the price—*that* they put in their pockets.

When the plaintiff filed his bill, the unlawful contract (for argument sake only conceding it to be such) had been executed, but the parties on one side were in possession of all the benefits resulting therefrom. They should not be suffered to interpose the objection that the contract which produced the benefits was in violation of law. As was said substantially in *Gilliam* v. *Brown*, *supra*: What law is violated, what rule of public policy is infringed, what encouragement is given to the violators of law, by compelling the defendants to turn over to the plaintiff his equitable share of the proceeds and benefits resulting from his faithful execution of the contract of August 9th, 1895?

REMEDY AT LAW.

Specific Performance.

But, say the defendants, even conceding that you have or had a lawful contract, or such right as the law will recognize

to recover your share of the proceeds and benefits which have been realized from the execution of an unlawful one, yet you have no case in this court—*having a plain, adequate and complete remedy at law.*

In support of this position, the defendants *first* assume that what we demand is a one-half interest in the stock of the Traction Company, *as it stands upon the market to-day*, and that this interest being readily measurable, we can, and therefore we must, sue for it or its value *at law*; and then cite authorities, page 62 of their brief, for the position that courts will *not decree specific execution* of a contract for the sale or delivery of *stock* "because it is *ordinarily* capable of exact measurement." (Italics ours.)

Our answer is clear, and it is three-fold, to-wit: (a) We have never demanded any such interest, as our pleadings will show; (b) the interest we have demanded and do demand is incapable of any such ready and exact estimate, as we have elaborately shown in our opening brief, notably on pages 107–108; and (c) the authorities generally, indeed some of the very authorities cited by the defendants, recognize exceptions to the general rule which are certainly broad enough to cover our case—indeed, show the "reason of that rule" to be such as to exclude our case from its operation: thus

COOK ON STOCKHOLDERS (3d Edition).

§ 336. "The vendee's remedy for a failure on the part of the vendor to deliver, is an action for damages, *or* a bill in equity to obtain specific performance."

§ 337 is headed "Specific Performance as a remedy for breach of a contract to sell stock."

§ 338. "If the stock contracted to be sold is easily obtained in the market, and there are no particular reasons why the vendee should have the particular stock contracted for, he is left to his action for damages. But, *where the value of the stock is not easily ascertainable, or the stock is not to be obtained readily elsewhere, or there is some particular and reasonable cause for the vendee's requiring the stock contracted to be delivered*, a court

of equity will decree a specific performance and compel the vendor to deliver the stock."

In *Eckstein* v. *Downing*, 64 N. H., 248, the first paragraph of the syllabus is as follows: "Equity does not decree specific performance of a contract for the sale of shares in a manufacturing corporation, *when it appears that the remedy furnished by an action at law for the breach of it is adequate*."

In *Baugardner* v. *Leavitt*, 35 W. Va., 194, the syllabus is instructive, but we have not time to copy it. Upon page 202, however, the court says: "The question of specific performance of contracts for the delivery of stock is frequently treated by the text-writers in an empirical and unsatisfactory manner, as if there were something peculiar in this character of personal property, which renders it impossible to classify it under any general rule. Mr. Fry, for example, does not hesitate to say positively that a contract for the sale of stock will not be specifically enforced, although he afterwards admits that railway shares form an exception. Fry, Spec. Perf., §§ 24, 27. Mr. Pomeroy's treatment of the subject is equally unsatisfactory. See Pom. Spec. Perf., §§ 17-19.

"The true principle would seem to be that, as a general rule, courts of equity will not enforce specific performance of contract for the delivery of shares of stock, but when a purchaser has bargained for such shares, or taken an option upon them, because they have for him a unique and special value, *the loss of which could not be adequately compensated by damages at law*, the chancellor, in the exercise of a sound discretion, may decree specific execution. This principle we find laid down and insisted upon in the more recent work of Mr. Waterman (1881). '*The same principles*,' he says, '*govern in contracts for the sale of stock as in the sale of other property*—that is, *if a breach can be fully compensated in damages, equity will not interfere*; while *it will do so* when, notwithstanding the payment of the money value of the stock, the plaintiff will still lose a substantial benefit, and thereby remain uncompensated. If a contract to convey stock is clear and definite, and the uncertain value of

the stock renders it difficult to do justice by an award of damages, specific performance will be decreed.' Wat. Spec. Perf., § 19."

All the above authorities are cited by the defendants on page 62 of their brief, but the italics are ours.

We regret we have not time to develope our position and trace the authorities further, but the defendants' answer to our opening brief has not been in our hands long enough to admit of thorough preparation of our reply. We trust, however, enough has been said to demonstrate, that it will not do to base the denial of Equity jurisdiction and relief upon the ground that the rights and wrongs of the plaintiff involved a claim to a share in the *stock* of the defendant company (from its inception,) and therefore can be adequately measured and compensated *at law*.

ACCOUNT.

Partnership.

We respectfully submit that the plaintiff is entitled to this equity, *first*, on the ground of the *partnership relation* existing between him and the defendants, and do not feel that the learned counsel have successfully answered the authorities adduced by us in support of this position.

True, in *Powell* v. *Maguire*, 43 Cal., 11, and *Thomason* v. *De Greager*, 31 Pacif. Rep., 567, which followed it, cited by defendants, it was held that the circumstances did not entitle the plaintiffs to the position and rights of partners of the defendants respectively. But, it should not be forgotten that in the first-named case the court held the entire agreement between plaintiff and defendant void as against Public Policy, and that the plaintiff, by his own showing, had done nothing, except to render certain lobby services. In the case at bar, on the contrary, the plaintiff has given valuable considerations, and has expended both labor and money in the enterprise.

It is also worthy of note that Lindley on Partnership, § 914, cited by defendants on page 62 of their brief, has a side note in the following words: "General Rule against Specific

Performance of Agreements for Partnership": that the first sentence of the adjoining text alludes to the existence of "exceptions" to said rule, and that, in the two or three pages following, some of these exceptions are set forth in cases not unlike the case at bar. In some instances, the learned author speaks of decrees being entered *for specific performance and an account*, when it was *not* deemed by the court that the circumstances were such as entitled the plaintiff to be regarded as *in all respects a partner of the defendant*.

A Court of Law Unequal to the Case.

But the strongest possible appeal, not only for the equity of *account*, but also for the general jurisdiction of a court of equity, in the plaintiff's case, is based upon the utter inadequacy of trial by jury and of common law procedure generally to deal with such a case, either in the way of adequate measure of the plaintiff's rights or adequate remedy for his wrongs. Indeed, the argument, if it has settled anything, has shown that even a court of equity, with all its flexible and adaptable machinery, and all its capacity for adjusting delicate equities, by reason of its ability to render conditional judgments and decrees, will find its great powers put to severe test in dealing with the conflicting rights involved in this controversy.

So emphatically is this true, that one of the arguments heretofore employed by the learned counsel to prejudice our case, is the suggestion of the great difficulty in framing a decree which will meet all the exigencies of the plaintiff's case, and at the same time extend even handed justice to the defendants.

In reply to which, we beg leave to say respectfully that, the time has not yet arrived for the consideration of this difficulty. We are just now concerned not so much with remedy as with right. The question is not now—how shall we frame a decree properly adjusted to all the equities of all the parties? That will come by and by, when all the facts are before the trial court. To-day, we are concerned rather with this question:

Has the plaintiff any equitable rights whatever, upon the case made in his last amended bill?

Our Remedy at Law: It is easy to see what the astute counsel for the defense think of it—it is fearful to imagine how they would juggle with it before a jury. In one of their briefs below, they blandly remitt us, for its realization, to the year of our Lord 1926, and in their brief filed in this honorable court (page 63), they suggest the following business-like and alluring calculation of the "damages" to which they consider us entitled:

"To give him in damages, his expenses, and the market value of the stock claimed, less its par value, would give him a *plain, adequate*, and *complete* remedy."

Upon this magnificent basis, and with elements such as these, it would require a millennium for a Babbage's calculator to estimate our receipts. How far *above* "par" do the learned counsel assume the "stock" of this company to be? *On which side of the ledger* would be the balance, if its "par" value be taken from its "market value?" What could more vividly illustrate the delusive and inadequate nature of the remedy which a court of law would give the plaintiff?

On pages 73–75 of their brief, the defendants make the point, properly falling under the head Remedy at Law and sub-head Specific Performance, that the

Contract is Wanting in Certainty and Mutuality.

Certainty.

It is familiar law that the "certainty" required in contracts to entitle them to be specifically informed, is only "*reasonable certainty*," and we do not believe that any unprejudiced man can read the contract of August 9, '95, and feel that it is lacking in this degree of certainty. One unacquainted with the law might be misled by the suggestion that the associates

of Hyer and of Sheild are not named; but every lawyer would at once recognize that silence as to such a feature, which can at any time be broken by proof, is not such lack of certainty as the law reprobates. In all other respects, the contract is unusually clear and explicit.

The learned counsel cite but three authorities on the requisite of "certainty"; to say the least, they do not strike us as fortunate citations. They are as follows:

Pomeroy's Equity, § 1405, which expressly embodies the modifying, practical word above referred to; stating that the requirement is only that the contract be "reasonably certain."

Colson v. *Thompson*, 2 Wheat, 336, employing the same modifying word; holding that the terms of the contract "should be so precise that neither party can reasonably misunderstand them." And from the opinion it appears, in strong contrast to the definite provisions of the contract of August 9, 1895, "that the amended bill states * * * that no particular stipulation was made respecting the compensation which he (the complainant) was to receive for his services, except that the general custom of the country in similar cases and the general tenor of the complainant's contracts with other persons for such services were to furnish the rule of compensation to be allowed him."

It need scarcely be suggested how difficult, or rather how impossible, it must be to enforce specific performance of such a contract. But this is not all. The bill did not go off on demurrer, but the defendant answered, and in his answer stated that "no contract of any sort was entered into between the complainant and himself." Is it to be wondered at that specific performance was refused?

Hissam v. *Parrish*, 24 S. E. Rep., 600.

As to this authority, the defendants' brief, on page 74, makes an elaborate and rather impressive statement, but when the case is carefully read the conclusion to be drawn from it is, we think, very different from what the learned counsel intended.

The following is an extract from the opinion in that case as to the requisite of "certainty": "It is true that the plaintiff alleges in his bill that, before the creation of said corporation and formation of said company, the defendants, for the purpose of creating said corporation and inducing him to take stock in said company to the amount of eight shares, of $100 per share, entered into the contract which is sought to be specifically enforced; but there is nothing of that kind appearing in the contract, which is made part of the bill, and we must look to the contract for its terms and parties, and, so far from being made before the corporation was formed, on the face of the contract the "Milton Manufacturing Company" appears to be made party of the second part, although it is signed by the defendants; and for this reason said contract cannot be considered reasonably certain as to its parties, and for these reasons my conclusion is that the court erred in overruling the demurrer."

It is obvious that the elements of uncertainty, which prevented the contract from being enforced in that case, do not characterize the case at bar. It is not true of our contract that one party is recited in it as party of the second part, while perfectly different parties sign it as parties of the second part; nor is it true of our case that the contract itself fails to contain statements explanatory of its purposes and provisions, which it is yet found necessary to incorporate in the bill. The contract in the case at bar is perfectly clear and distinct in these particulars.

Need we discuss further the requisite of "certainty" in the contract of August 9, 1895? Are we not authorized to say that this feature of that contract is brought out in strong relief against the dark and confused background of the authorities cited by the defendants? No chancellor, as we believe, would hold this contract unenforceable because of the lack of certainty in its terms and provisions, and especially not *upon demurrer*.

Mutuality.

But, say the defendants, a contract to be enforced must be *mutual*—*i. e.*, characterized by *mutuality of obligation*. Hyer's

obligations were to withdraw the Conduit franchise and to co-operate with the Traction side in procuring another, and manifestly no court could compel him to do either of those things.

We fail utterly to appreciate this reasoning.

Certain parts of this contract of August 9th would doubtless have proved, if the attempt had been made, very difficult to enforce. Co-operation in a partnership enterprise is an awkward thing to compel, but neither side, in the case at bar, has asked anything of the sort. The basis of the antecedent considerations upon both sides being complied with, one side was and would have been equally as compellable as the other to let that other into a one-half interest in the franchise and enterprise. It was not properly a contract upon Sheild's part that he would give Hyer a one-half interest in his Traction franchise (at the time he had none), if Hyer would do certain things. They met as equals; both were to co-operate, and certain specific services were to be and were rendered by Hyer; but beyond this co-operation and these services, Hyer and Sheild, each for his side, agreed that they would share equally in the enterprise. Neither side accuses the other, so far as the record shows, of any failure of co-operation. No such phase of the agreement is before the court. We come then to the contract obligation, which we do ask should be specifically enforced. What was it but a contract of equals that they would share equally? If Hyer had eliminated and excluded Sheild from participation in it, the contract of August 9, 1895, would have been just as enforceable in Sheild's behalf, as we claim it now to be in Hyer's.

The position that this contract is lacking in the requisite of "mutuality" seems to be founded on such a total misapprehension (as we have above attempted to show), that it can scarcely be necessary to examine the authorities cited in support of it; yet we will briefly advert to them, as follows, to-wit:

FRY ON SPECIFIC PERFORMANCE, § 286.

"A contract to be specifically performed must be mutual: that is to say, such that it might at the time it was entered into

have been enforced by either party." This limitation of the required mutuality, to the time the contract was entered into, is explained by the last proposition of the syllabus in *Moore* v. *Fitz Randolph*, 6 Leigh, 175, also cited in the same connection, which is as follows: "The rule, that equity refuses specific execution of contracts where the remedy is not mutual, applies to cases in which there is not such mutuality of remedy at the time the contract is made; not to cases in which the mutuality of remedy is taken away by a subsequent contingent event."

Smith v. *Applegate*, 3 Zab. (N. J.), 352, is entirely inapplicable. The court, in that case, merely emphasized and illustrated its view, that the contract could not be enforced in favor of the side that sought to enforce it—by the consideration that, upon the other side it was yet more clearly void, as contrary to Public Policy.

Hissam v. *Parrish*, 24 S. E. Rep., 600, is cited as an authority upon the requirement of "mutuality" also: but, in order to appreciate the entire lack of mutuality in the contract sought to be specifically enforced in this case, it is only necessary to read it, as set out on page 601, and then to read the following brief extract from the opinion of the court, on page 602—to-wit: "The bill, however, omits to state that the purchase by the defendants of his stock at that price was to be *at plaintiff's option*, which appears on the face of the contract." (Italics ours.) We have attempted to show that there was entire mutuality in that clause or phase of his contract which the plaintiff brought before the court and asked to have specifically enforced, while in *Hissam* v. *Parrish* the court, on page 602, further said: "The portion, then, of the contract which the court was asked specifically to perform, is that in reference to the purchase of the plaintiff's eight shares of stock; but, in that portion of the contract, as we have attempted to show, there is no mutuality and no consideration."

Is it too much to say that the case of *Hissam* v. *Parrish*, like the other authorities cited by the defendants as to the requisites of "certainty" and "mutuality," serves well to de-

monstrate how free from objection is the contract in the case at bar in both these respects.

The case is with the court; but in submitting it, may we be allowed a single suggestion, always appropriate upon demurrer—doubly so where, as here, the fate of that demurrer depends upon the validity of the contract, as affected by Public Policy; where the contract will be sustained unless its invalidity clearly appears, and where, if capable of two constructions upon one of which it may be held valid, the law requires that construction to be adopted which will validate it.

In such a case, if the court shall lean a little further in favor of the contract than the facts as hereafter developed shall justify, the defendants will merely have been postponed in the vindication of their rights; but if the court shall fail to give the contract the most liberal and favorable construction of which it is capable, the loss of the plaintiff's rights will be final and fatal.

Respectfully Submitted,

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APPENDIX.

The six grounds of demurrer on which the defendants still rely will be found listed on page 18 of their brief. On account of entire change in their form and arrangement, we have felt it best to reply to the first *three* of these grounds in our brief proper, being the only ones which, in our view, embody points likely to prove of weight in the solution of the case.

There remain, therefore, to be herein considered, grounds 4, 5 and 6, as per the new table of defenses above referred to. We will take up and discuss these briefly in order; and first—

Ground 4 in new Table of Defenses

(Grounds VIII and IX in old.)

Plaintiff's conduct and the relief he asks inequitable.

We stand upon what was said in our opening brief, Appendix, pages 124–125, in answer to grounds VIII and IX.

If it be deemed desirable to add anything, we would say, after reading defendants' elaborate, distempered, confused and inconsistent indictment of the plaintiff under this head, that to "the jaundiced eye" of the learned counsel—"eye to which all order festers," "eye to which all good is bad"—everything our unfortunate client has done in the premises, and equally everything he has not done, makes proof as strong as Holy Writ, to convict him of having *unclean hands* and *an impure heart*.

We do not believe a Court of Equity will take this prejudiced view of the plaintiff's case It will rather adopt what would seem, upon demurrer at least, to be *the more natural construction of his conduct*, to-wit: that the plaintiff—a stranger, struggling single-handed against a powerful combination, which,

after getting out of him benefits and advantages not only important but vital to their success, met him with impudent denial of his claims—determined, at first of his own judgment but afterwards confirmed and developed by counsel, that the best and safest course was to give full notice of his rights at every step, and to file a bill asking every appropriate form of relief, but not pressing any of these to extremity, or to the possible ruin and destruction of the enterprise in which he claimed to be interested—especially in view of the fact that the defendants had demurred to his bill upon grounds going to the very foundation of his rights.

Ground 5 in new Table of Defenses.

(Substantially identical with Ground V in old.)

The contract is one between promoters, which cannot be enforced against the defendants.

We rely upon what was said in answer to this point in the Appendix to our opening brief, pages 116–122; and regret that we have only time, in addition, to say that we do not agree with the learned counsel in their limitation of the effect and operation of the *equitable estoppel of the corporation* (by receiving the benefit of the contract made with its promoters) to *third parties*; so as to exclude a person standing in such relation to the corporation as our client stood to the defendant company. We have seen nothing in the authorities so limiting the principle, and there is neither sound reason nor good morals in the limitation.

In addition to the authorities before cited by us, see Thompson on Corporations, §§ 480, 481, agreeing substantially with Morawetz, §§ 547, 549; *Weatherford, &c.*, v. *Granger*, 86 Tex., 350; *Empress Engineering Co.*, 16 L. R. Ch. Div., 125, especially the opinions of Sir Geo. Jessel on page 129, and of Lord Justice James, page 130.

Ground 6 in new Table of Defenses.

(Ground VII in old.)

Quo Warranto our Remedy.

We stand upon what was said in our opening brief under this head, Appendix, page 124. If there is anything in the point calling for further notice, we are laboring under entire misapprehension with regard to it.

Respectfully submitted,

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